

SENATE BILL 2312  
By Fowler

AN ACT to amend and repeal appropriate portions of Tennessee Code Annotated, Title 32, Chapter 11; Title 33; Title 34 and Title 68, relative to the "Tennessee Health Care Decisions Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 68, Chapter 11, is amended by adding the following as a new part 17:

Section 68-11-1701. This part may be cited as the "Tennessee Health Care Decisions Act."

Section 68-11-1702.

(a) As used in this part, unless the context clearly requires otherwise:

(1) "Advance directive" means an individual instruction or a written statement relating to the subsequent provision of health care for the individual, including, but not limited to, a living will or a durable power of attorney for health care.

(2) "Agent" means an individual designated in an advance directive for health care to make a health care decision for the individual granting the power.

(3) "Capacity" means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision.

(4) "Designated physician" means a physician designated by an individual or the individual's agent, guardian, or surrogate, to have primary

responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes such responsibility.

(5) "Guardian" means a judicially appointed guardian or conservator having authority to make a health care decision for an individual.

(6) "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition.

(7) "Health care decision" means a decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including, but not limited to:

(i) selection and discharge of health care providers and institutions;

(ii) approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and

(iii) directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care.

(8) "Health care institution" means an institution, facility, or agency licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

(9) "Health care provider" means an individual licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession.

(10) "Individual instruction" means an individual's direction concerning a health care decision for the individual.

(11) "Person" means an individual, corporation, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(12) "Personally informing" means a communication by any effective means from the patient directly to a health care provider.

(13) "Physician" means an individual authorized to practice medicine or osteopathy under Tennessee Code Annotated, Title 63, Chapters 6 or 9.

(14) "Power of attorney for health care" means the designation of an agent to make health care decisions for the individual granting the power.

(15) "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs. Such availability shall include, but not be limited to, availability by telephone.

(16) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(17) "Supervising health care provider" means the designated physician or, if there is no designated physician or the designated physician is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care.

(18) "Surrogate" means an individual, other than a patient's agent or guardian, authorized under this part to make a health care decision for the patient.

(19) "Treating health care provider" means a health care provider who at the time is directly or indirectly involved in providing health care to the patient.

(b) The terms "principal", "individual", and "patient" may be used interchangeably in this part unless the context requires otherwise.

#### Section 68-11-1703.

(a) An adult or emancipated minor may give an individual instruction. The instruction may be oral or written. The instruction may be limited to take effect only if a specified condition arises.

(b) An adult or emancipated minor may execute an advance directive for health care, which may authorize the agent to make any health care decision the principal could have made while having capacity. The advance directive must be in writing and signed by the principal. The advance directive must either be notarized or witnessed by two (2) witnesses. The power remains in effect notwithstanding the principal's later incapacity and may include individual instructions. For the purposes of this section, a witness shall be a competent adult.

(c) Unless otherwise specified in an advance directive, the authority of an agent becomes effective only upon a determination that the principal lacks capacity, and ceases to be effective upon a determination that the principal has recovered capacity.

(d) A determination that an individual lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority

of an agent, must be made by the designated physician. In making such determination, a designated physician is authorized to consult with such other persons as he or she may deem appropriate.

(e) An agent shall make a health care decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

(f) A health care decision made by an agent for a principal is effective without judicial approval.

(g) An advance directive may include the individual's nomination of a guardian of the person.

(h) An advance directive that is executed outside of this state by a nonresident of this state at the time of execution shall be given effect in this state if that advance directive is in compliance with either the provisions of this part or the laws of the state of the principal's residence.

(i) A health care provider or institution may not require or prohibit the execution or revocation of an advance directive as a condition for providing health care.

#### Section 68-11-1704.

(a) An individual having capacity may revoke the designation of an agent only by a signed writing or by personally informing the supervising health care provider.

(b) An individual having capacity may revoke all or part of an advance directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

(c) A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in an advance directive.

(d) An advance directive that conflicts with an earlier advance directive revokes the earlier directive to the extent of the conflict.

#### Section 68-11-1705.

(a) The board for licensing health care facilities shall develop and issue appropriate model forms for advance directives that are consistent with provisions of this part.

(b) The board for licensing health care facilities is authorized to promulgate rules and regulations in order to implement the provisions of this part, in accordance with the provisions of Tennessee Code Annotated, Title 4, Chapter 5.

#### Section 68-11-1706.

(a) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health care provider. The designation may be oral or written.

(b) A surrogate may make a health care decision for a patient who is an adult or emancipated minor if and only if: (1) the patient has been determined by the designated physician to lack capacity, and (2) no agent or guardian has been appointed or the agent or guardian is not reasonably available.

(c)

(1) In the case of a patient who lacks capacity, has not appointed an agent, has not designated a surrogate, and does not have a guardian, or whose agent, surrogate, or guardian is not reasonably available, the patient's surrogate shall be identified by the supervising health care provider and documented in the current clinical record of the institution or institutions at which the patient is then receiving health care.

(2) The patient's surrogate shall be an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, who is reasonably available, and who is willing to serve.

(3) Consideration may be given in order of descending preference for service as a surrogate to:

(A) the patient's spouse, unless legally separated;

(B) the patient's adult child;

(C) the patient's parent;

(D) the patient's adult sibling;

(E) any other adult relative of the patient; or

(F) any other adult who satisfied the requirements of subdivision (c)(2) of this section.

(4) The following criteria shall be considered in the determination of the person best qualified to serve as the surrogate:

(A) Whether the proposed surrogate reasonably appears to be better able to make decisions either in accordance with the known wishes of the patient or in accordance with the patient's best interests;

(B) The proposed surrogate's regular contact with the patient prior to and during the incapacitating illness;

(C) The proposed surrogate's demonstrated care and concern;

(D) The proposed surrogate's availability to visit the patient during his or her illness; and

(E) The proposed surrogate's availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the decision-making process.

(5) If none of the individuals eligible to act as a surrogate under this subsection (c) is reasonably available, the designated physician may make health care decisions for the patient after the designated physician either:

(A) Consults with and obtains the recommendations of an institution's ethics mechanism; or

(B) Obtains concurrence from a second physician who is not directly involved in the patient's health care, does not serve in a capacity of decision-making, influence, or responsibility over the designated physician, and is not under the designated physician's decision-making, influence, or responsibility.

(6) In the event of a challenge, there shall be a rebuttable presumption that the selection of the surrogate was valid. Any person who challenges the selection shall have the burden of proving the invalidity of that selection.

(d) A surrogate shall make a health care decision in accordance with the patient's individual instructions, if any, and other wishes to the extent known to the surrogate. Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the patient's best interest. In determining



the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate.

(e) A surrogate who has not been designated by the patient may make all health care decisions for the patient that the patient could make on the patient's own behalf, except that artificial nutrition and hydration may be withheld or withdrawn for a patient upon a decision of the surrogate only when the designated physician and a second independent physician certify in the patient's current clinical records that the provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying and the patient is highly unlikely to regain capacity to make medical decisions.

(f) A health care decision made by a surrogate for a patient is effective without judicial approval.

(g)

(1) Except as provided in subdivision (2) of this subsection:

(A) Neither the treating health care provider nor an employee of the treating health care provider, nor an operator of a health care institution nor an employee of an operator of a health care institution may be designated as a surrogate; and

(B) A health care provider or employee of a health care provider may not act as a surrogate if the health care provider becomes the principal's treating health care provider.

(2) An employee of the treating health care provider or an employee of an operator of a health care institution may be designated as a surrogate if:

(A) The employee so designated is a relative of the principal by blood, marriage, or adoption; and

(B) The other requirements of this section are satisfied.

(h) A health care provider may require an individual claiming the right to act as surrogate for a patient to provide a written declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

Section 68-11-1707.

(a) Absent a court order to the contrary, a guardian shall comply with the patient's individual instructions and may not revoke the patient's advance directive.

(b) Absent a court order to the contrary, a health care decision of an agent takes precedence over that of a guardian.

(c) A health care decision made by a guardian for the patient is effective without judicial approval.

Section 68-11-1708.

(a) A designated physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists which affects an individual instruction or the authority of an agent, guardian, or surrogate, shall promptly record the determination in the patient's current clinical record and communicate the determination to the patient, if possible, and to any person then authorized to make health care decisions for the patient.

(b) Except as provided in subsections (c), (d), and (e) of this section, a health care provider or institution providing care to a patient shall:

(1) comply with an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient; and

(2) comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

(c) A health care provider may decline to comply with an individual instruction or health care decision for reasons of conscience.

(d) A health care institution may decline to comply with an individual instruction or health care decision if the instruction or decision:

(1) is contrary to a policy of the institution which is based on reasons of conscience, and

(2) the policy was timely communicated to the patient or to a person then authorized to make health care decisions for the patient.

(e) A health care provider or institution may decline to comply with an individual instruction or health care decision that requires medically inappropriate health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution.

(f) A health care provider or institution that declines to comply with an individual instruction or health care decision pursuant to subsections (c), (d), or (e) of this section shall:

(1) promptly so inform the patient, if possible, and any person then authorized to make health care decisions for the patient;

(2) provide continuing care to the patient until a transfer can be effected or until the determination has been made that transfer cannot be effected;

(3) unless the patient or person then authorized to make health care decisions for the patient refuses assistance, immediately make all

reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision; and

(4) if a transfer cannot be effected, the health care provider or institution shall not be compelled to comply.

Section 68-11-1709. Unless otherwise specified in an advance directive, a person then authorized to make health care decisions for a patient has the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information.

Section 68-11-1710.

(a) A health care provider or institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) complying with a health care decision of a person apparently having authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

(2) declining to comply with a health care decision of a person based on a belief that the person then lacked authority; or

(3) complying with an advance directive and assuming that the directive was valid when made and has not been revoked or terminated.

(b) An individual acting as agent or surrogate under this part is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

(c) A person identifying a surrogate under this part is not subject to civil or criminal liability or to discipline for unprofessional conduct for such identification made in good faith.

Section 68-11-1711.

(a) A health care provider or institution that intentionally violates this part is subject to liability to the aggrieved individual for damages of two thousand five hundred dollars (\$2,500) or actual damages resulting from the violation, whichever is greater, plus reasonable attorney's fees and costs.

(b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual's advance directive or a revocation of an advance directive without the individual's consent, or who coerces or fraudulently induces an individual to give, revoke, or not to give an advance directive, is subject to liability to that individual for damages of two thousand five hundred dollars (\$2,500) or actual damages resulting from the action, whichever is greater, plus reasonable attorney's fees and costs.

Section 68-11-1712.

(a) This part does not affect the right of an individual to make health care decisions while having capacity to do so.

(b) An individual is presumed to have capacity to make a health care decision, to give or revoke an advance directive, and to designate or disqualify a surrogate.

Section 68-11-1713. A copy of a written advance directive, revocation of an advance directive, or designation or disqualification of a surrogate has the same effect as the original.

Section 68-11-1714.

(a) This part does not create a presumption concerning the intention of an individual who has not made or who has revoked an advance directive.

(b) Death resulting from the withholding or withdrawal of health care in accordance with this part does not for any purpose constitute a suicide or homicide or legally impair or invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any term of the policy or annuity to the contrary.

(c) The withholding or withdrawal of medical care from a patient in accordance with the provisions of this part shall not, for any purpose, constitute a suicide, euthanasia, homicide, mercy killing, or assisted suicide.

(d) This part does not authorize a surrogate to give consent for or take any action on behalf of a patient on any matter governed by Tennessee Code Annotated, Title 33.

Section 68-11-1715. On petition of a patient, the patient's agent, guardian, or surrogate, a health care provider or institution involved with the patient's care, or an individual described in Section 68-11-1706(c)(5), a court of competent jurisdiction may enjoin or direct a health care decision or order other equitable relief. A proceeding under this section shall be expedited on the court's civil dockets.

SECTION 2. Tennessee Code Annotated, Title 68, Chapter 140, Part 6, is amended by deleting the part in its entirety.

SECTION 3. Tennessee Code Annotated, Section 68-11-224, is amended by deleting the section in its entirety and by substituting instead the following:

(a) A universal do not resuscitate order may be issued by a physician for his patient with whom he has a bona fide physician/patient relationship, but only:

(1) with the consent of the patient; or

(2) if the patient is a minor or is otherwise incapable of making an informed decision regarding consent for such an order, upon the request of and with the consent of the agent, surrogate, or other person authorized to consent on the patient's behalf under the Tennessee Health Care Decisions Act; or

(3) if the patient is a minor or is otherwise incapable of making an informed decision regarding consent for such an order and the agent, surrogate, or other person authorized to consent on the patient's behalf under the Tennessee Health Care Decisions Act is not reasonably available, the physician determines that the provision of cardiopulmonary resuscitation would be contrary to accepted medical standards.

(b) If the patient is an adult who is capable of making an informed decision, the patient's expression of the desire to be resuscitated in the event of cardiac or respiratory arrest shall revoke a universal do not resuscitate order. If the patient is a minor or is otherwise incapable of making an informed decision, the expression of the desire that the patient be resuscitated by the person authorized to consent on the patient's behalf shall revoke a universal do not resuscitate order. Nothing in this section shall be construed to require cardiopulmonary resuscitation of a patient for whom the physician determines cardiopulmonary resuscitation is not medically appropriate.

(c) Universal do not resuscitate orders issued in accordance with this section shall remain valid and in effect until revoked. In accordance with this section and applicable regulations, (1) qualified emergency medical services personnel, and (2) licensed health care practitioners in any facility, program or organization operated or licensed by the board for licensing health care facilities or by the department of mental health and developmental disabilities or operated, licensed, or owned by another state agency are authorized to follow universal do

not resuscitate orders that are available to them in a form approved by the board for licensing health care facilities.

(d) Nothing in this section shall authorize the withholding of other medical interventions, such as intravenous fluids, oxygen, or other therapies deemed necessary to provide comfort care or to alleviate pain.

(e) For the purposes of this section:

(1) "Emergency responder" means a paid or volunteer firefighter, law enforcement officer, or other public safety official or volunteer acting within the scope of his or her proper function under law or rendering emergency care at the scene of an emergency.

(2) "Health care provider" shall have the same meaning as ascribed to that term in Tennessee Code Annotated Section 68-11-1702(a)(9), and shall include, but shall not be limited to, qualified emergency medical services personnel.

(3) "Person authorized to consent on the patient's behalf" means any person authorized by law to consent on behalf of the patient incapable of making an informed decision or, in the case of a minor child, the parent or parents having custody of the child or the child's legal guardian or as otherwise provided by law.

(4) "Qualified emergency medical service personnel" shall include, but shall not be limited to, emergency medical technicians, paramedics, or other emergency services personnel, providers, or entities acting within the usual course of their professions, and other emergency responders.

(5) "Universal do not resuscitate order" means a written order that applies regardless of the treatment setting and that is signed by the patient's physician which states that in the event the patient suffers



cardiac or respiratory arrest, cardiopulmonary resuscitation should not be attempted.

(f) If a person with a universal do not resuscitate order is transferred from one health care facility to another health care facility, the health care facility initiating the transfer shall communicate the existence of the universal do not resuscitate order to the receiving facility prior to the transfer. The transferring facility shall assure that a copy of the universal do not resuscitate order accompanies the patient in transport to the receiving health care facility. Upon admission, the receiving facility shall make the universal do not resuscitate order a part of the patient's record.

(g) This section shall not prevent, prohibit, or limit a physician from issuing a written order, other than a universal do not resuscitate order, not to resuscitate a patient in the event of cardiac or respiratory arrest in accordance with accepted medical practices. This section shall have no application to any do not resuscitate order that is not a "universal do not resuscitate order," as defined in this section.

(h) Valid do not resuscitate orders or emergency medical services do not resuscitate orders issued before July 1, 2004, pursuant to the then-current law, shall remain valid and shall be given effect as provided in this section.

(i)

(1) The board for licensing health care facilities shall promulgate rules and create forms regarding procedures for the withholding of resuscitative services from patients in accordance with the provisions of this act and this section.

(2) The rules shall address:

(A) The mechanism or mechanisms for reaching decisions about the withholding of resuscitative services from individual patients;

(B) The mechanism or mechanisms for resolving conflicts in decision making, should they arise; and

(C) The roles of physicians and, when applicable, of nursing personnel, other appropriate staff, and family members in the decision to withhold resuscitative services.

(3) The rules shall include provisions designed to assure that patients' rights are respected when decisions are made to withhold resuscitative services and shall include the requirement that appropriate orders be written by the physician primarily responsible for the patient, and that documentation be made in the patient's current clinical record if resuscitative services are to be withheld.

(4) The provisions of this section shall not be construed or implemented in any manner which restricts or impairs the decision-making authority of the agent, surrogate, or other person designated in the Tennessee Health Care Decisions Act. This section does not authorize a surrogate to give consent for or take any action on behalf of a patient on any matter governed by Tennessee Code Annotated, Title 33.

(j) A health care provider or institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability for:

(1) complying with a universal do not resuscitate order;

(2) declining to comply with a universal do not resuscitate order based on a reasonable belief that the order then lacked validity; or

(3) complying with a universal do not resuscitate order and assuming that the order was valid when made and has not been revoked or terminated.

SECTION 4. Tennessee Code Annotated, Title 32, Chapter 11, is amended by adding the following as a new section:

Section 32-11-113. Living wills executed in accordance with this chapter before July 1, 2004 shall be given effect under the terms of the Tennessee Health Care Decisions Act.

SECTION 5. Tennessee Code Annotated, Title 34, Chapter 6, Part 2 is amended by adding the following as a new section:

Section 34-6-217. Powers of attorney executed in accordance with this part before July 1, 2004 shall be given effect under the terms of the Tennessee Health Care Decisions Act.

SECTION 6. Tennessee Code Annotated, Sections 32-11-101 through 32-11-112, inclusive, are amended by deleting the sections in their entireties.

SECTION 7. Tennessee Code Annotated, Sections 34-6-201 through 34-6-216, inclusive, are amended by deleting the sections in their entireties.

SECTION 8. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 9. The board for licensing health care facilities is authorized to promulgate rules and regulations in order to implement the provisions of this act, in accordance with the provisions of Tennessee Code Annotated, Title 4, Chapter 5.

SECTION 10. For purposes of rulemaking this act shall take effect on becoming a law, for all other purposes, this act shall take effect July 1, 2004, the public welfare requiring it.